MOTION FILED MAR 9 1959

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 13

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

FRED N. ACKER,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE and BRIEF OF GEORGE OLSHAUSEN AS AMICUS CURIAE.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 553

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

FRED N. ACKER,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

George Olshausen hereby asks leave to file a brief as Amicus Curiae in support of the respondent's position in the above case.

The proposed brief Amicus Curiae is submitted herewith. In advance of filing the brief, I asked for consents from the parties under Rule 42.2 at the same time outlining the contents of the proposed brief. On February 11, 1959, the Solicitor General declined consent; the respondent never answered.

I now have the identical question pending before the Court of Appeals of the Ninth Circuit in *Olshausen v. C.I.R.*, No. 16183.

While I have not seen the briefs in the above case, I have read the opinions in *Acker v. C.I.R.*, 258 F. 2d 568; *Patchen v. C.I.R.*, 258 F. 2d 544; *Hansen v. C.I.R.*, 258 F. 2d 585.

In none of these opinions is either of the following questions considered (which raises the inference that neither of these points has been briefed):

1. The presence of special definitions of other terms used in the 1939 act (secs. 11, 12, 15, 22) coupled with the absence of any special definitions of the terms used in sec. 294, as precluding any construction except the ordinary meaning of the terms used in sec. 294.

2. The authorities holding that where a statute has a well-defined meaning within its four corners, resort cannot be had to congressional committee reports to contradict that meaning—and the effect of this rule upon the construction of sec. 294(d).

The brief *amicus curiae* deals with each of these questions.

For which reasons it is respectfully submitted that the leave to file the accompanying brief *amicus curiae* be granted.

Dated, San Francisco, California,
March 2, 1959.

Respectfully submitted,
GEORGE OLSHAUSEN,
Amicus Curiae.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 553

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

FRED N. ACKER,
Respondent.

BRIEF OF GEORGE OLSHAUSEN AS AMICUS CURIAE.

1. General Principles of Construction.

a. On its face, Sec. 294 uses the phrases "failure to file" and "substantial underestimation" separately and with separate meanings. Since they are used separately in different subsections, they are assumed to be used in different senses. A statute is to be construed to give meaning to every one of its terms.

(*U.S. v. Menasche*, 348 U.S. 528, 538; *Platt v. Union P.R. Co.*, 99 U.S. 48, 58-9.)

This view is reinforced by Secs. 11, 12, 15, 22 of the 1939 act, which give lists of special definitions. The ordinary meaning of "substantial underestimation" is an affirmative act, not a mere passive omission. Cf. definitions of "estimate": *Lougee v. N. Mex. B.&R.*, 41 N. Mex. 115, 76 P. 2d 6, 17; *State ex rel. v. Beach*, 325 Mo. 175, 28 S.W. 2d 105; *Miller, Franklin & Co. v. Gentry*, 230 Mo. App. 892, 79 S.W. 2d 470, 474; *Peo. v. Clark*, 37 Hun. (44 N.Y. Sup. Ct.) 201, 203; *Galloway v. Week*, 54 Wis. 604, 12 N.W. 10, 11; 31 C.J.S. 183. But statutes can and sometimes do incorporate special definitions of terms which they use. *But no section contains any special definition* of the phrase "substantial underestimation". This corroborates the *prima facie* interpretation: "failure to file" and "substantial underestimation" have distinct meanings in Sec. 294 and do not overlap.

b. *Fuller v. C.I.R.*, 20 T.C. 308, quotes a Congressional conference report to the effect that where no estimated tax return is filed, the estimate will be taken to have been zero for purposes of Sec. 294(d)(2). (There is also a treasury regulation to the same effect, but, of course, the regulation cannot supply anything which is not in the statute. *U.S. v. Calamaro*, 354 U.S. 351, 358-9, 1 L. Ed. (2d) 1394, 1399-1400.)

The trouble with this item from the conference report is that it goes contrary to the ordinary meaning of the language of the statute in its final form. Where a statute has a well-defined meaning within

its four corners, resort cannot be had to legislative committee reports to *contradict* that meaning.

Bate Refrigerating Co. v. Sulzberger, 157 U.S. 41-46.

Helvering v. City Bank F.T. Co., 296 U.S. 85, 89:

"We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used."

McKenzie v. Hare, 239 U.S. 299, 308:

"Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language; or rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been give more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others."

U.S. v. Shreveport Grain & C. Co., 287 U.S. 77, 83:

"In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. *They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms.*" (Emphasis added.)

U.S. v. Mo. Pac. Ry., 278 U.S. 269, 278:

"When doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and

other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative interest. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended *and in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.*" (Emphasis added.)

Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356:

"Much is said in the briefs concerning the reports of committees concerned with the enactment of this legislation, but the words of the act are plain, and their meaning is apparent, without the necessity of resorting to the extraneous and often unsatisfactory aid of such reports."

Penn. Ry. v. Int. Coal Mine Co., 230 U.S. 184, 199:

"But while they may be looked at to explain doubtful expressions, not even formal reports . . . can be resorted to for the purpose of construing a statute contrary to its plain meaning, or to make identical that which is radically different."

Caminetti v. U.S., 242 U.S. 470.

From these authorities it is clear (1) that the Conference committee report cannot be used to "construe" section 294 of the 1939 act, since (2) the section both on its face and in conjunction with sections 11, 12, 15, 22, shows that "failure to file" and "sub-

stantial underestimation" are two different things, and the act does not impose the penalties for both on one alone. Here, where non-filing is claimed, it was error for the Tax Court also to impose a penalty for supposed "substantial underestimation."

2. Decided cases.

None of the decided cases considers either the effect of the list of special definitions contained in Sees. 11, 12, 15, 22, nor the principle that outside aids to construction are impermissible except in case of ambiguity. Even with these limitations, the Sixth Circuit held the provisions not cumulative. (*Acker v. C.I.R.*, 258 F. 2d 568.).

Hansen v. C.I.R., 258 F. 2d 585, was a decision of the Ninth Circuit, before Judges Pope, Barnes, Hamley. The opinion is written by Judge Barnes. With all due respect to the learned panel, this opinion bases its holdings upon wholly unsound considerations.

The *first* is the same conference report used in the *Fuller* case, *supra*. We have already shown that the statute has a definitely-ascertainable meaning within its four corners, in which event no resort may be had to conference reports to change that meaning.

Secondly, the panel points to the circumstance that the 1954 Internal Revenue Act explicitly makes the two sections *non* cumulative. This is thought to show that the 1939 act must have been cumulative.

But that indicates a failure to think the problem through.

The 1954 act cannot give the 1939 act any different meaning from what the 1939 act had when it was passed. The later act is at best an extrinsic aid to construction. It may be used under the same circumstances and to the same extent as any other extrinsic aid to construction. That is to say, it may be used, if at all, to clear up an ambiguity where the meaning of the statute cannot be determined from its four corners. But, as we have already seen, Sec. 294(d) taken together with Secs. 11, 12, 15, 22, has a definitely ascertainable meaning within its four corners. (As also already noted, these sections are overlooked by all the opinions.) Since Sec. 294(d) has a definitely ascertainable meaning, extrinsic aids to construction are inadmissible. This includes the subsequent statute. (The 1954 amendment showed merely that Congress disapproved the Commissioner's administration of the 1939 Act.)

Patchen v. C.I.R., 258 F. 2d 544 (C.A. 5), likewise makes an incomplete analysis. Pointing out that willful underestimation is penalized regardless of excuse, while non-filing is excused by reasonable cause, it says:

> (p. 552) "This imports that this is expected to be an additional sanction for those who without justification, fail to file a declaration or pay."

This wholly overlooks the aspect that under this construction, Sec. 294(d) may be held to impose an independent penalty *even where the non-filing is found to be excused by reasonable cause*. Conversely, it means that Sec. 294(d)(1)(A) *could never stand*

alone—which runs counter to the framework of the section, which makes 294(d)(1)(A) a subdivision of 294(d)(1) and not a subdivision of 294(d)(2).

The *Patchen* opinion also says:

> (p. 552) "And more important, it might have recognized that those whose willful non-excusable acts prevented the effective operation of the scheme of self-assessment and current payment, ought to bear some additional disadvantage over the person whose arithmetic or prognostication was merely faulty."

This we submit misconstrues 294(d)(2) and again incompletely considers 294(d)(1)(A).

The above passage misconstrues 294(d)(2) because the ordinary meaning of "underestimation" is not an arithmetical error. Again, under the ordinary meaning of the terms, the requirement that the underestimation be "substantial", eliminates the cases where the prognostication is "merely" faulty.

The above passage incompletely considers 294(d)(1)(A) because it does not even discuss the situation where non-filing is held *excusable*, but where (under the Commissioner's contention) a penalty would nonetheless be exacted under 294(d)(2) which does not mention non-filing at all.

3. **Summary.**

The ordinary meaning of the language of Secs. 294(d)(1)(A) and 294(d)(2) coupled with the special definitions given in Secs. 11, 12, 15, 22, shows that sections 294(d)(1)(A) and 294(d)(2) are meant to

apply to distinct situations, and are not intended to overlap. Since they do not overlap, they cannot be applied cumulatively to the same act or omission.

Dated, San Francisco, California,
March 2, 1959.

Respectfully submitted,
GEORGE OLSHAUSEN,
Amicus Curiae.